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No. (1)

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

TIBER SHIPPING LLC;
RIO GRANDE TRANSPORTS, *in personam*,

Petitioners,

v.

BP OIL INTERNATIONAL LTD; BP EXPLORATION & OIL INC; EMPRESA ESTATAL PETROLEOS DEL ECUADOR (Petroecuador),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit err in allowing both buyer and seller of a consignment of gasoline to bring suit as "real parties in interest"?

2. Was it proper for the United States Court of Appeals for the Fifth Circuit to affirm a judgment of the District Court which misinterpreted and misapplied a previous determination of the United States Court of Appeals for the Fifth Circuit thereby imposing an improper presumption against TIBER Shipping LLC and Rio Grande Transports, *in personam* (hereinafter collectively referred to as "TIBER Shipping Interests")?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this Petition is as follows:

Defendant/Claimant – Appellant – Cross-Appellee Tiber Shipping, LLC is referred to hereafter as "Tiber Shipping."

Defendant – Appellant – Cross-Appellee Rio Grande Transports, Inc. is referred to as "Rio Grande." TIBER Shipping and Rio Grande are collectively referred to as "TIBER Shipping Interests." The M/T TIBER is referred to as "TIBER."

Plaintiff – Appellee – Cross-Appellant BP Oil International Ltd. is referred to as "BP Oil."

Plaintiff – Appellee – Cross-Appellant BP Exploration and Oil, Inc. is referred to as "BP Exploration." BP Oil and BP Exploration are collectively referred to as "BP."

Defendant – Appellant Empresa Estatal Petroleos del Ecuador (Petroecuador) is referred to as "PetroEcuador."

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PETITION FOR A WRIT OF CERTIORARI

TIBER Shipping Interests respectfully petition for a Writ of Certiorari to review the opinion and judgment of The United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Fifth Circuit is dated January 16, 2008 and is reproduced herein at App. A.

The Memorandum Opinion and Order of The United States District Court for the Southern District of Texas, Houston Division, dated October 21, 2004, wherein the Court entered its Final Judgment against the TIBER Shipping Interests in favor of BP is reproduced herein at App. B.

JURISDICTION

Federal jurisdiction of this action was grounded upon 28 U.S.C. 1337(a), it being based upon a tort, breach of contract, and breach of bailment obligations and upon Rule 9(h), being within the Admiralty and Maritime jurisdiction of the Court. The Judgment of the United States Court of Appeals for the Fifth Circuit to be reviewed was entered January 16, 2008. Defendant-Appellant Cross-Appellant timely filed a Petition for a Rehearing En Banc February 1, 2008, which was denied on February 21, 2008. This Petition

is timely under 28 U.S.C. 2101(c) and under Supreme Court Rule 13 because it is being filed within 90 days of the denial of rehearing. This Court has jurisdiction to review the judgment of The United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This matter concerns claims for damages arising from the increased gum formation in a cargo of gasoline carried from Houston to La Libertad, Ecuador, on board the TIBER. On April 8, 1998, PetroEcuador sent BP an invitation to bid for supplying 140,000 barrels of unleaded gasoline. BP responded to the bidding invitation, and the sale was confirmed as "CFR La Libertad – Ecuador." As previously explained by the Fifth Circuit Court of Appeals, "CFR" stands for "Cost and Freight" and is an International Commercial Term ("Incoterm"), which is incorporated into the Convention on Contracts for the International Sale of Goods ("CISG"). *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 335 (5th Cir. 2003). "CFR" shipments "require the seller to pay the costs and freight to transport the goods to the delivery port, but pass title and risk of loss to the buyer once the goods 'pass the ship's rail' at the port of shipment." *Id.* at 338. The sale contract also contained a specification that the gasoline have a gum content of less than three milligrams per one hundred milliliters, to be determined

at the port of loading. To perform its sales contract, BP purchased gasoline from Shell Oil Company ("Shell"), and the product was to be received by BP at Shell's refinery in Deer Park, Texas.

For the transportation of the gasoline cargo, BP time-chartered the tanker TIBER from Rio Grande.[1] The charter fixture between BP and Rio Grande nominates the TIBER as containing "ALUBRASS COILS." The TIBER's previous three cargoes were reformulated gasoline, naphtha, and gas oil. All three previous cargoes were loaded and delivered without incident. Prior to arriving at the Deer Park dock, the TIBER had cleaned, dried, and inerted its cargo tanks, as required by the BP charter party. Prior to loading, the TIBER discharged all ballast and slop water. The TIBER tendered its Notice of Readiness to load the Deer Park cargo on April 19, 1998. Prior to loading the cargo, a marine surveyor from Saybolt, the surveying company nominated by PetroEcuador, Shell, and BP but not by the TIBER Shipping Interests, certified the cargo tanks as clean, dry, and fit to load. No free water was found in any of the TIBER's cargo tanks.

The particular cargo to be loaded was basically unleaded gasoline. However, it was not created or blended prior to when the TIBER arrived for loading. Contrary to the instructions from BP to Saybolt this

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[1] At the time, Rio Grande had time-chartered the TIBER from its owner, TIBER Shipping.

cargo was blended "in line," and, in essence, created as it was being pumped into the ship's tanks. The cargo was comprised of many components, some of which were and still remain unknown. Various parcels were blended in an "active" tank called AP-8. The material that was actually loaded onto the TIBER was comprised, at a minimum, of at least the following components:

1. Over 33,000 barrels of the "heel" or residue remaining in the bottom of AP-8 from multiple previous and unidentifiable blends;

2. The gasoline blend 98SO96, "Batch No.1," which was blended on April 16-17, 1998;

3. The gasoline blend 98SO98, "Batch No.2," which was blended on April 20, 1998, after the vessel had already commenced loading; and,

4. Approximately 750 barrels of undetermined material in the dockline connecting AP-8 to the dock.

It is undisputed that the material that was ultimately loaded onto the TIBER was never completely blended and static. Because the cargo was never in a state that could be sampled in a representative manner, BP relied on selected samples taken from the ship *after* the product had passed the ship's rail to comply with its contractual obligations to PetroEcuador. Saybolt never sampled the product lines feeding gasoline components into AP-8, the heel of AP-8, or any blending product in AP-8. Saybolt did

obtain two samples from the dockline, but these samples were representative only of the material which happened to be in the sampling point at the time of testing and not of the entire cargo. The dockline contained a "significant" amount of water prior to loading. Saybolt also sampled the cargo on the vessel. Logically, samples taken from the ship after the cargo had passed the ship's rail cannot show a difference or comparison between the quality of the cargo on shore and the quality of the cargo on the ship. In other words, these samples cannot establish the order and condition of the cargo prior to loading. None of the samples taken by Saybolt were representative of the entire cargo. One set of samples were "one foot" samples, taken when approximately one foot of cargo had been pumped into the TIBER's tanks. As the name implies, the sampling can only be representative of approximately the first foot of cargo and is not representative of all the cargo loaded aboard the ship. Saybolt also collected "composite" samples by taking upper, middle, and lower samples from the tanks and blending them together. The United States Court of Appeals for the Fifth Circuit has recognized that "composite samples" after loading are not necessarily representative of the condition of the cargo. *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.*, 826 F.2d 424, 428 (5th Cir. 1987). Regardless of the foregoing, BP relied on the ship's samples to determine the contractual specification of the cargo through Saybolt.

During loading, both Saybolt and the TIBER issued Notices of Protest to the Shell shore facility to

protest loading operations. A Notice of Protest is a document usually issued to officially object to and contest a practice of another party before, during, or after loading of the cargo. Saybolt issued its Notice of Protest on April 19, 1998, the day cargo loading began, protesting (1) "failure to adequately verify fullness condition of shore loading or discharge lines;" and (2) "active shore tank during loading."

The TIBER also issued a Notice of Protest to contest and note the fact that the terminal was loading cargo from an active tank. The ship protested this direct loading of cargo because "[t]here's always the chance that the terminal has not exercised due diligence as to measure the amount of quantity that has come to the tank as well as the quality." On April 21, 1998, the TIBER issued a Notice of Protest concerning the free water found aboard the ship. The ship issued this Notice because the ship had been found to be dry with no water residue but, after loading, 31.5 barrels or 1323 gallons of free water were found in tank 6C. At the time of cargo operations, the ship officially protested the amount of free water found aboard the TIBER, as it could have only come from a shore source.

On the same date, the TIBER issued a Notice of Protest to contest the fact that no cargo "quality documents" had been given to the ship. It is "normal procedure" after loading operations are complete for documents providing the analysis and specifications of the cargo *outside of the ship* to be delivered to the ship. Even if the ship is instructed to leave "early,"

some type of quality document is delivered to the ship. Without these documents, the ship has "no indication of what the quality is" of the loaded cargo. When the cargo arrived in La Libertad, Ecuador, PetroEcuador rejected the cargo as failing contractual specifications for both gum content and oxidation stability.

On May 14, 1999, BP filed suit against PetroEcuador, asserting diversity and federal question jurisdiction and asserting claims for breach of contract and wrongful draw on a letter of guarantee, arising from the alleged wrongful rejection of the gasoline by PetroEcuador. On October 19, 1999, BP separately filed suit against the TIBER Shipping Interests *in personam* and the TIBER *in rem* under Cause Number 99-3638. On December 2, 1999, Tiber Shipping and Rio Grande filed their Answers to BP's Original Complaint. On February 2, 2000, Tiber Shipping filed its Claim of Owner for the TIBER. On February 4, 2000, the two cases were consolidated into the original case, bearing the Cause Number 99-1475. BP filed its Second Amended Original Complaint on April 20, 2000, asserting a negligence action against Saybolt.

On November 9, 2001, the Trial Court granted Motions for Summary Judgment filed by PetroEcuador and Saybolt. Orders dismissing PetroEcuador and Saybolt from the action, in conformity with the summary judgments, were entered on January 16, 2002. The Trial Court's Order was appealed to this Court by BP.

On appeal, The United States Court of Appeals for the Fifth Circuit affirmed the granting of Saybolt's Motion for Summary Judgment on a warranty theory, dismissing Saybolt from the case, but reversed the granting of PetroEcuador's Motion for Summary Judgment on application of Ecuadorian law and its requirement that BP provide conforming goods at the agreed destination. *BP Oil Int'l, Ltd.*, 332 F.3d at 333. The Court held that title to the cargo passed to PetroEcuador at "the ship's rail" unless PetroEcuador could prove that BP "knew or could not have been unaware" of a defective condition of the cargo prior to that time. *Id.* at 338. The TIBER Shipping Interests were not parties to and could not have the opportunity to participate in that appeal. *Id.* While that appeal was proceeding, the claims against the TIBER Shipping Interests were held in abeyance.

On remand, the TIBER Shipping Interests filed a Motion for Summary Judgment against BP's claims on the basis that the Fifth Circuit's opinion confirmed that BP could not have standing to simultaneously recover on claims that (1) PetroEcuador wrongly rejected cargo to which the title had already passed to PetroEcuador; and, (2) for the same cargo, cargo damage against the TIBER Shipping Interests. The Trial Court denied the TIBER Shipping Interests' Motion for Summary Judgment on April 13, 2004.

The case proceeded to bench trial before the Honorable Judge Kenneth M. Hoyt on August 16, 2004 and was completed on August 20, 2004. On October 12, 2004, the Trial Court entered its Memorandum

and Order. On October 21, 2004, the Trial Court entered its Final Judgment awarding a total of $3,380,128.01 plus pre- and post-judgment interest against PetroEcuador and $3,179,418.01 plus pre- and post-judgment interest against the TIBER Shipping Interests in favor of BP, such that BP could recover the latter amount against any or all of the Defendants as a joint and severable judgment but could only recover the difference of $289,749.36 against PetroEcuador. On November 1, 2004, the TIBER Shipping Interests filed their Notice of Appeal, thereby appealing the Trial Court's ruling to the United States Court of Appeals for the Fifth Circuit.

On November 4, 2004, PetroEcuador filed a Motion to Alter or Amend the Judgment, Motion for New Trial, and Motion to Amend Findings of Fact and Conclusions of Law. The Trial Court denied the Motion on December 17, 2004. On December 27, 2004, BP filed its Notice of Cross Appeal. PetroEcuador filed its Notice of Appeal on January 18, 2005. On January 16, 2008, the Panel of the United States Court of Appeals for the Fifth Circuit issued its Opinion, affirming the judgment of the Trial Court. The TIBER Shipping Interests timely filed a Petition for a Rehearing En Banc February 1, 2008, which was denied on February 21, 2008. The TIBER Shipping Interests now file this Petition for Writ of Certiorari.

ARGUMENT

I. Did the United States Court of Appeals for the Fifth Circuit err in allowing both buyer and seller of a consignment of gasoline to bring suit as "real parties in interest"?

Under Federal Rule of Civil Procedure 17(a), every action brought in federal court must be prosecuted in the name of the real party in interest. FED. R. CIV. P. 17(a); *Farbwerke Hoeschst A.G. v. M/V "DON NICKY,"* 589 F.2d 795, 797 (5th Cir. 1979); *Alaska Russia Salmon Caviar Co., Inc. v. M/V "MARIT MAERSK,"* 2000 A.M.C. 2297, 2000 WL 145124, *3 (S.D.N.Y. 2000); *Marine Office of Amer. Corp. v. Lilac Marine Corp.*, 296 F.Supp.2d 91, 99 (D. Puerto Rico 2003). Thus, BP lacks standing to assert a claim in this action. When shipments are made "C.I.F." or "C & F," title to the cargo passes upon delivery to the carrier, making the buyer bear the risk of loss. *DON NICKY*, 589 F.2d at 797; *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *3; *Marine Office*, 296 F.Supp.2d at 99. Thus, when cargo is allegedly damaged during carriage, the real party in interest is the buyer, and the seller has no right to sue the carrier. *See DON NICKY*, 589 F.2d at 797; *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *3; *Marine Office*, 296 F.Supp.2d at 99. The fact that the buyer has not paid the seller or that the seller has consequentially suffered some loss in the transaction does not entitle it to sue. *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *4.

There are only three recognized exceptions to the general rule that a seller does not have standing to sue a carrier for cargo damage in a "C.I.F" transaction:

(1) when the seller acted as the buyer's representative, if said action is ratified by the latter;

(2) when the seller acted as the buyer's agent in replacing and repairing the damaged cargo; or,

(3) when the goods are rejected by the buyer and the seller accepts that rejection.

Marine Office, 296 F.Supp.2d at 100.

The first two exceptions are not implicated here: there has never been any argument or evidence that BP was acting as PetroEcuador's agent or representative in any capacity or that the cargo was replaced or repaired.

The third exception is also inapplicable. Although it is undisputed that PetroEcuador rejected the cargo, it is also undisputed that BP did not "accept" that rejection. In this context, "acceptance" is not mere physical retention of the goods by the seller but its acceptance of the buyer's *rightful* rejection of the goods. *See Marine Office*, 296 F.Supp.2d at 100; *Transmarine Corp. v. Charles H. Levitt & Co.*, 25 F.2d 275, 277-78 (2nd Cir. 1928). "The cause of action against the carrier was appurtenant to the title and followed it back to the seller upon his acceptance."

Transmarine, 25 F.2d at 278. The seller terminates the buyer's right to sue the carrier only when it again bears the loss of the rejected goods. *Id.* Thus, when a seller claims that the cargo has been wrongfully rejected, it is asserting that title, risk, and loss remained with the buyer. It is *not* "accepting" the loss. In this situation, the fact that the seller physically retains the cargo is merely collateral to the fact that the buyer, with whom title still rests, would not physically accept it. The seller's actions in disposing of that retained cargo are simply an effort to mitigate and do not reinvest the seller with standing to sue *the carrier*. When wrongful rejection is asserted, the loss allegedly experienced by the seller must be recovered against the *buyer*.

In its previous opinion, the Fifth Circuit Court of Appeals held that risk and title to the gasoline cargo passed to PetroEcuador when the cargo passed "the ship's rail." *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 333, 338 (5th Cir. 2003). To determine whether PetroEcuador wrongly refused the cargo, the only question remaining was whether BP "knew or could not have been unaware" that it was providing defective gasoline. *Id.* If so, BP was in breach of the sales contract and would retain title, and thereby retain title to sue the carrier, the TIBER Shipping Interests. *Id.* at 339.

BP has no standing to sue the TIBER Shipping Interests, as title and risk of loss transferred to PetroEcuador. *DON NICKY*, 589 F.2d at 797; *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *3;

Marine Office, 296 F.Supp.2d at 99. The Fifth Circuit Court of Appeals stated that as a consignee, BP has standing to sue and cites to *McKinlay v. Morrish*, 62 U.S. (21 How.) 343, 355 (1858), in support thereof. However, this misconstrues the legal status and standing of the consignee. A consignee is one who has the right to receive goods because of their ownership or contract rights. *See THE SALLY MAGEE,* 70 U.S. 451, 457 (1865). Here, those rights were superseded by the sales contract between BP and PetroEcuador, which transferred title and the right to receive the cargo to PetroEcuador. *BP Oil,* 332 F.3d at 338. As the title holder, PetroEcuador was entitled to receive the cargo based upon the contract with BP and BP no longer held those rights. Accordingly, those cases relying on the consignee status are inapposite as BP no longer had the consignee's rights.

Further, the Fifth Circuit Court of Appeals' reliance on *Prevor-Mayorsohn Caribbean, Inc. v. P. R. Marine Mgmt., Inc.*, 620 F.2d 1 (1st Cir. 1980) in support of its opinion that "TIBER [sic] Interests were not exposed to double recovery" is misplaced. In *Prevor-Mayorsohn*, the appellant corporation was a wholly owned subsidiary of its parent corporation and was the bailee for a spoiled shipment of fruit. *Id.* at 1. The trial court dismissed the corporation's action after it determined that it was only the bailee of the fruit and did not actually hold title to the fruit. *Id.* The First Circuit, however, vacated the judgment of the district court, thereby allowing the wholly owned subsidiary corporation to maintain its action despite

the fact that the parent company actually held title to the fruit. *Id.* at 4.

The First Circuit reasoned that because "Prevor and its parent company are clearly all part of a single operation," the defendant therein was "amply protected against the possibility of exposure to subsequent suit." *Id.* at 5. *Prevor-Mayorsohn* is therefore clearly distinguishable from the facts herein because BP and PetroEcuador are not corporately related.

Moreover, simply because PetroEcuador did not pursue a cause of action against the TIBER Shipping Interests does not negate the fact that the possibility of double exposure exists. In fact, the TIBER Shipping Interests could be subject to a lawsuit brought by PetroEcuador in either a U.S. or an Ecuadorian Court. Thus, the TIBER Shipping Interests are clearly not adequately protected from a double recovery.

II. Was it proper for the United States Court of Appeals for the Fifth Circuit to affirm a judgment of the District Court which misinterpreted and misapplied a previous determination of the United States Court of Appeals for the Fifth Circuit thereby imposing an improper presumption against the TIBER Shipping Interests?

The Trial Court's Opinion begins the analysis by stating:

> The Fifth Circuit held that while gasoline samples taken by Shell and Saybolt established that the gasoline cargo was within contract specifications at the load point, they did not resolve the issue of whether there was a known or hidden defect in the gasoline. It is the Court's view that this fact and holding establish a presumption that the cargo had no hidden defect.

(R. Tab 185, 2939). To the extent that this statement correctly interprets the Fifth Circuit Court of Appeals' prior holding, *it cannot be applied as to the TIBER Shipping Interests*. The Court of Appeals does not dispute this, but makes the incorrect statement that the Trial Court only applied the presumption to PetroEcuador. This is incorrect. The Trial Court specifically held "[t]he presumption that the cargo had no hidden defects has not been overcome by the defendants." (R. Tab 185, 2929). This must include *both* PetroEcuador and the TIBER Shipping Interests in order to be "defendants."

The only sentence of the Fifth Circuit's prior opinion that could be construed as a "finding of fact" regarding the condition of the cargo is "[i]ndeed, Saybolt's testing confirmed that the gasoline's gum content was adequate before departure from Texas." *BP Oil*, 332 F.3d at 338. A logical reading of this sentence does not impute a finding of good order and condition. To the extent that it does, and in light of the undisputed evidence that (1) no representative pre-loading samples of the cargo were taken; and (2)

the alleged "composite" samples taken from the TIBER's tanks were not representative of a homogenous cargo, it was clearly erroneous.

Even if the previous holding of the Fifth Circuit could be held against the TIBER Shipping Interests, the Trial Court's interpretation of the holding misconstrues its scope and the context in which it was written. The previous opinion only discusses the contractual obligations between PetroEcuador and BP. *BP Oil*, 332 F.3d at 338. The discussion is not in the context of a bailment claim, a COGSA claim, or even a negligence claim. The presented issue was simply whether PetroEcuador properly refused the cargo under the terms and conditions of their contract. *Id.* at 335. To the extent that there exists a factual finding that the cargo complied with the contractual specifications at loading, it was only necessary in the context of determining whether PetroEcuador breached its contract with BP. It was absolutely irrelevant in determining the rights and liabilities as between BP and the TIBER Shipping Interests.

Thus, the Trial Court's improper imposition of any presumption regarding the condition of the cargo against the TIBER Shipping Interests was manifest error, not supported by the record, not supported by any legal authority, and the Fifth Circuit Court of Appeal's endorsement by arguing the clear burden placed on the Plaintiff is error.

CONCLUSION

It Is Respectfully Requested That The Decision Of The Fifth Circuit Court of Appeals Be Reversed And That The Case Be Remanded To The District Court In Houston For Further Proceedings.

Respectfully submitted,

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APPENDIX A

2008 WL 162889

United States Court of Appeals, Fifth Circuit.
BP OIL INTERNATIONAL, LTD.;
BP Exploration & Oil, Inc., Plaintiffs-Appellees,
v.
EMPRESA ESTATAL PETROLEOS DE ECUADOR
(PETROECUADOR), et al., Defendants-Appellant.
BP Oil International, LTD.; BP Exploration &
Oil, Inc., Plaintiffs-Appellees Cross-Appellants,
v.
Tiber Shipping LLC; Rio Grande Transports,
in personam, Defendants-Appellants Cross-Appellees.
No. 04-20911.

Jan. 16, 2008.

Timothy W. Strickland, Fowler Rodriguez & Chalos, Charles Felix Herd, Jr., The Lanier Law Firm, Houston, TX, Mary Campbell Hubbard, Antonio J. Rodriguez, Fowler Rodriguez & Chalos, New Orleans, LA, for Plaintiffs-Appellees-Cross-Appellants.

William Andrew Durham, Bronwyn G. Douglass, Eastham, Watson, Dale & Forney, Houston, TX, for Defendant-Appellant-Cross-Appellees.

Appeals from the United States District Court for the Southern District of Texas, Nos. 4:99-CV-3638, 4:99-CV-1475.

Before BARKSDALE, BENAVIDES, and OWEN, Circuit Judges.

PER CURIAM:*

Following a bench trial in this shipping case, defendants Tiber Shipping, LLC and Rio Grande Transport, Inc. (collectively "the TIBER Interests") appeal the district court's judgment in favor of the plaintiffs, BP Oil International Ltd. and BP Exploration & Oil, Inc. (collectively "BP"), and defendant-cross-plaintiff Empresa Estatal Petroleos Del Ecuador (PetroEcuador) appeals the district court's judgment in favor of the TIBER Interests on PetroEcuador's cross-claim. We affirm.

I

PetroEcuador contracted with BP to purchase 140,000 barrels of unleaded gasoline. The contract specified that the gasoline have a gum content of less than three milligrams per one hundred milliliters and an oxidation stability of 240 to be determined at the point of departure. BP purchased the gasoline from Shell Oil Company. BP time-chartered the M/T TIBER from the TIBER Interests to transport the cargo from Texas to Ecuador. Following testing at the point of departure, the gasoline was loaded on board the M/T TIBER. When the cargo arrived in Ecuador, however, PetroEcuador rejected the gasoline because

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

it did not meet the contractual specifications for gum content or oxidation stability. BP later sold the gasoline at a loss of almost two million dollars.

BP sued the TIBER Interests for breach of its duties and obligations under the charter party and bill of lading and for breach of bailment. BP also sued PetroEcuador for breach of contract and for wrongfully drawing on BP's letter of guarantee. PetroEcuador filed a cross-claim against the TIBER Interests "under the theory of bailment for PetroEcuador's benefit." After a bench trial, the district court rendered judgment in favor of BP on its claims against the TIBER Interests and PetroEcuador. The district court also rendered judgment against PetroEcoador [sic] on its cross-claim.

Both the TIBER Interests and PetroEcuador appealed the adverse judgment on BP's claims against them, and PetroEcuador appealed the adverse judgment on its cross-claim against the TIBER Interests. PetroEcuador and BP subsequently settled the claims between them and filed a joint motion for partial dismissal of the appeal on all of the issues between them. We GRANTED the joint motion of PetroEcuador and BP for partial dismissal of the appeal.

The motion to dismiss did not include PetroEcuador's appeal of the judgment against it on its cross-claim against the TIBER Interests. Therefore, those issues remain pending and are unaffected by the settlement except to the extent PetroEcuador assigned

its rights in that claim to BP as part of the settlement. The contractual assignment of rights, however, does not affect the analysis of the issues on appeal. The TIBER Interests' appeal was unaffected by the settlement.

II

The TIBER Interests challenge the district court's finding that BP delivered the gasoline cargo to the M/T TIBER in good order and condition without any hidden defects. With regard to this issue, the TIBER Interests argue that (1) the district court applied an improper legal standard and (2) the district court's factual findings were clearly erroneous.

The district court did not apply an improper legal standard to BP's claim against the TIBER Interests. Earlier in this case, the district court granted PetroEcuador's summary judgment against BP, but this court reversed the interlocutory summary judgment on appeal, holding that PetroEcuador could only recover against BP if BP "provided goods that it 'knew or could not have been unaware' were defective when they 'passed over the ship's rail.'"[1] On remand, the district court determined that the language in our

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[1] *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador,* 332 F.3d 333, 338-39 (5th Cir.2003) (quoting United Nations Convention on Contracts for the International Sale of Goods (CISG), art. 40, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 19 I.L.M. 671 (1983), reprinted at 15 U.S.C. app. (entered into force Jan. 1, 1988)).

earlier opinion created a "presumption that the cargo had no hidden defect." The TIBER Interests argue that the district court improperly applied this presumption against them despite the fact that they were not a party to the prior appeal. The district court, however, only applied this presumption to BP's claims against PetroEcuador.

In evaluating BP's claims against the TIBER Interests, the district court applied bailment law. In a bailment claim, the burden of proof is on the bailor, and to make its prima facie case, the bailor must "prov[e] that the [cargo] was delivered to the bailee in good condition and damaged while in [the bailee's] possession . . . and the duty then devolves upon the bailee to go forward with the evidence and show affirmatively that he exercised ordinary care."[2] The district court found that BP's evidence "establishe[d] a prima facie case against the TIBER on BP's bailment claim" and the TIBER Interests failed to rebut BP's prima facie case. The district court applied proper bailment law to BP's claim.

While BP's claim against the TIBER Interests is possibly governed by the Carriage of Goods by Sea Act (COGSA), the TIBER Interests have not challenged the district court's conclusion that bailment law applies to BP's claim. This court, therefore, need not reach the issue of whether the district court erred

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[2] *Stegemann v. Miami Beach Boat Slips, Inc.*, 213 F.2d 561, 564 (5th Cir.1954) (citations omitted).

in applying bailment law instead of COGSA. Because the district court did not apply an improper presumption to BP's claim against the TIBER Interests, the TIBER Interests' first argument fails.

With regard to the district court's finding that BP delivered the cargo to the M/T TIBER in good order and condition without any hidden defects, this court will not set aside a district court's factual findings unless they are clearly erroneous.[3] A finding is clearly erroneous when the appellate court, viewing the evidence in its entirety, "is left with the definite and firm conviction that a mistake has been committed."[4] If the district court's finding is plausible in light of the record viewed as a whole, the court of appeals cannot reverse even though, if sitting as the trier of fact, it would have weighed the evidence differently.[5] "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[6] We conclude, after a complete review of the record, that there was ample evidence to support the district court's finding that BP delivered the cargo to the M/T TIBER in good order and condition without any hidden defects.

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[3] FED.R.CIV.P. 52(a); *see also Anderson v. Bessemer City*, 470 U.S. 564, 573-75, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

[4] *Anderson*, 470 U.S. at 573 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

[5] *Id.* at 573-74.

[6] *Id.* at 574.

III

The TIBER Interests next challenge BP's standing to recover against them. The TIBER Interests argue that BP is not the real party in interest to its claim against the TIBER Interests because title and risk of loss of the cargo passed to PetroEcuador upon delivery to the TIBER. BP does, however, have standing to recover against the TIBER Interests under the bill of lading. A bill of lading is "the contract of carriage between the shipper and the carrier, [and it] continues to govern the rights and obligations of the parties until the delivery of the cargo."[7] Because BP was the consignee in the bill of lading, it remained a party-in-interest even after the cargo was loaded onto the M/T TIBER.[8] BP, therefore, had standing to sue the TIBER Interests. This conclusion is supported by the fact that the TIBER Interests were not exposed to a double recovery.[9]

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[7] *Metro. Wholesale Supply, Inc. v. M/V ROYAL RAINBOW,* 12 F.3d 58, 61 (5th Cir.1994).

[8] *See McKinlay v. Morrish,* 62 U.S. (21 How.) 343, 355, 16 L.Ed. 100 (1858) ("[F]rom the nature of the contract of a bill of lading, the consignee has a right to sue, in a court of admiralty, for any breach of [the bill of lading]."); *see also Prevor-Mayorsohn Caribbean, Inc. v. P.R. Marine Mgmt.,* 620 F.2d 1, 4 (1st Cir.1980) ("Long-established admiralty practice allows either 'an owner or consignee (to) recover damage to the cargo.'" (quoting *Elia Salzman Tobacco Co. v. SS Mormacwind,* 371 F.2d 537, 540 (2d Cir.1967))).

[9] *See Prevor-Mayorsohn Caribbean, Inc.,* 620 F.2d at 4 ("[C]ourts have often looked to the practicalities of the situation in assessing the likelihood that a carrier might ultimately be

(Continued on following page)

IV

PetroEcuador contends that the district court erroneously decided its cross-claim against the TIBER Interests "under the theory of bailment" when the cross-claim was actually a third-party beneficiary claim. The TIBER Interests argue that (1) PetroEcuador's cross-claim, as pled, is a bailment claim and not a third-party beneficiary claim (2) PetroEcuador's cross-claim is time-barred by COGSA, and (3) even if a third-party beneficiary claim was properly before the district court, the claim fails as a matter of law because PetroEcuador was not a third-party beneficiary to the contract between BP and the TIBER Interests.

Even if we assume that PetroEcuador's cross-claim was a third-party beneficiary claim, PetroEcuador cannot prevail on that claim as a matter of law. Both PetroEcuador and the TIBER Interests cite Texas and federal maritime law regarding third-party beneficiaries, and each party agrees that the requirements are the same under both. In order to recover as a third-party beneficiary to a contract, the plaintiff must prove that the parties to the contract intended to benefit the third-party as evidenced

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exposed to a double recovery and, when satisfied that double recovery is not a threat, and that the plaintiff has a proper interest in maintaining the action, have allowed that plaintiff to maintain that action." (citations omitted)).

"solely from the language of the contract."[10] In this case, the contract between BP and the TIBER Interests consists of the bill of lading and the charter party. PetroEcuador cannot recover as a third-party beneficiary to the contract between BP and PetroEcuador because there is no contractual language in either the bill of lading or the charter party evidencing a clear intent by BP and the TIBER Interests to benefit PetroEcuador.[11] PetroEcuador, therefore, cannot show that BP and the TIBER Interests intended for PetroEcuador to benefit by their written agreements.

* * *

We AFFIRM the district court's judgment in favor of BP on its claims against the TIBER Interests, and we AFFIRM the district court's judgment against PetroEcuador on its cross-claim against the TIBER Interests.

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[10] *Palma v. Verex Assurance, Inc.*, 79 F.3d 1453, 1457 (5th Cir.1996); *see also Atl. & Gulf Stevedore, Inc. v. Revelle Shipping Agency, Inc.*, 750 F.2d 457, 459 & n. 3 (5th Cir.1985).

[11] *See MCI Telecomm. Corp. v. Tex. Util. Elec. Co.*, 995 S.W.2d 647, 651 (Tex.1999) ("The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied." (citation omitted)).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BP EXPLORATION & OIL INC and BP OIL INTERNATIONAL LTD,	§	
Plaintiff,	§	CIVIL ACTION
VS.	§	NO. H-99-1475
EMPRESA ESTATAL PETROLEOS DE ECUADOR (PETROECUADOR) and SAYBOLT INC and SHELL OIL COMPANY,	§	
Defendant.	§	

JUDGMENT

In accordance with this Court's opinion that the evidence and law are in favor of plaintiffs, BP Oil International Ltd., and BP Exploration and Oil Inc. (collectively referred to as "BP"), and for the reasons given in the memorandum and order entered October 13, 2004 after full trial of the captioned action,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs have judgment against defendant Empresa Estatal Petroleos Del Ecuador ("Petro-Ecuador") in the amount of $3,380,128.01 plus pre-judgment interest at the rate of 5.407%, the applicable 52-week treasury bill rate, from May 3, 1998 until judgment, for a total of $4,745,314.77;

2. Plaintiffs have judgment against defendants M/T TIBER, her engines, tackle and gear, Tiber Shipping, L.L.C., and Rio Grande Transport for the amount of $3,179,418.01, plus pre-judgment interest at the rate of 5.407%, the applicable 52-week treasury bill rate, from May 14, 1998 until judgment, for a total of $4,456,565.41;

3. Plaintiffs may not recover its damages twice, but may recover up to $4,456,565.41 from either defendant or any combination of defendants;

4. The remaining $289,749.36 is recoverable and executable only against PetroEcuador;

5. Post-judgment interest is payable on the above amounts at the rate of 2.18% from the date of this judgment until paid;

6. Defendants to pay court costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that PetroEcuador's cross-claim against defendants M/T TIBER, her engines, tackle and gear, Tiber Shipping, L.L.C. and Rio Grande Transport, be and is dismissed with prejudice.

SIGNED and ENTERED 10/21/2004

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

APPENDIX C

In the
United States Court of Appeals
for the Fifth Circuit

No. 02-20166

BP OIL INTERNATIONAL, LTD.,
AND
BP EXPLORATION & OIL, INC.,

Plaintiffs-Appellants,

VERSUS

EMPRESA ESTATAL PETROLEOS DE ECUADOR (PETROECUADOR), ET AL.,

Defendants,

EMPRESA ESTATAL PETROLEOS DE ECUADOR (PETROECUADOR)
AND
SAYBOLT, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

(Filed Jun. 11, 2003)

Before SMITH and BARKSDALE, Circuit Judges, and FITZWATER,* District Judge.

JERRY E. SMITH, Circuit Judge:

Empresa Estatal Petroleos de Ecuador ("PetroEcuador") contracted with BP Oil International, Ltd. ("BP"), for the purchase and transport of gasoline from Texas to Ecuador. PetroEcuador refused to accept delivery, so BP sold the gasoline at a loss. BP appeals a summary judgment dismissing PetroEcuador and Saybolt, Inc. ("Saybolt"), the company responsible for testing the gasoline at the port of departure. We affirm in part, reverse in part, and remand.

I.

PetroEcuador sent BP an invitation to bid for supplying 140,000 barrels of unleaded gasoline deliverable "CFR" to Ecuador. "CFR," which stands for "Cost and FReight," is one of thirteen International Commercial Terms ("Incoterms") designed to "provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade."[1] Incoterms are recognized through their incorporation into the Convention on Contracts for

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* District Judge of the Northern District of Texas, sitting by designation.

[1] INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS 1990 (1990); *see also Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 380 n.5 (5th Cir. 2002).

the International Sale of Goods ("CISG").[2] *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH,* 2002 U.S. Dist. LEXIS 5096, at *9-*10 (S.D.N.Y. Mar. 26, 2002).

BP responded favorably to the invitation, and PetroEcuador confirmed the sale on its contract form. The final agreement required that the oil be sent "CFR La Libertad-Ecuador." A separate provision, paragraph 10, states, "Jurisdiction: Laws of the Republic of Ecuador." The contract further specifies that the gasoline have a gum content of less than three milligrams per one hundred milliliters, to be determined at the port of departure. PetroEcuador appointed Saybolt, a company specializing in quality control services, to ensure this requirement was met.

To fulfill the contract, BP purchased gasoline from Shell Oil Company and, following testing by Saybolt, loaded it on board the M/T TIBER at Shell's Deer Park, Texas, refinery. The TIBER sailed to La Libertad, Ecuador, where the gasoline was again tested for gum content. On learning that the gum content now exceeded the contractual limit, PetroEcuador refused to accept delivery. Eventually, BP resold the gasoline to Shell at a loss of approximately two million dollars.

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[2] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 19 I.L.M. 668 (1980), reprinted at 15 U.S.C. app. (entered into force Jan. 1, 1988).

BP sued PetroEcuador for breach of contract and wrongful draw of a letter of guarantee. After PetroEcuador filed a notice of intent to apply foreign law pursuant to FED. R. CIV. P. 44.1, the district court applied Texas choice of law rules and determined that Ecuadorian law governed. BP argued that the term "CFR" demonstrated the parties' intent to pass the risk of loss to PetroEcuador once the goods were delivered on board the TIBER. The district court disagreed and held that under Ecuadorian law, the seller must deliver conforming goods to the agreed destination, in this case Ecuador. The court granted summary judgment for PetroEcuador.

BP also brought negligence and breach of contract claims against Saybolt, alleging that the company had improperly tested the gasoline.[1] Saybolt moved for summary judgment, asserting a limitation of liability defense and waiver of claims based on the terms of its service contract with BP. The court granted Saybolt's motion, holding that BP could not sue in tort, that BP was bound by the waiver provision, and that Saybolt did not take any action causing harm to BP. Pursuant to FED. R. CIV. P. 54(b), the court entered final judgment in favor of PetroEcuador and Saybolt.

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[1] BP also filed an amended admiralty claim against the TIBER *in rem*, Tiber Shipping, L.L.C., and Rio Grande Transport *in personam*.

II.

We review a summary judgment using the same standards as did the district court; thus our review is *de novo. Walton v. Alexander,* 44 F.3d 1297, 1301 (5th Cir. 1995) (en banc). Summary judgment is proper where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). All inferences from the record must be construed in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88 (1986). "[O]nly when there is a choice of reasonable interpretation of the contract is there a material fact issue concerning the parties' intent that would preclude summary judgment." *Amoco Prod. Co. v. Tex. Meridian Res. Exploration, Inc.,* 180 F.3d 664, 669 (5th Cir. 1999).

III.

BP and PetroEcuador dispute whether the domestic law of Ecuador or the CISG applies. After recognizing that federal courts sitting in diversity apply the choice of law rules of the state in which they sit, *Coghlan v. Wellcraft Marine Corp.,* 240 F.3d 449, 452 n.2 (5th Cir. 2001) (citation omitted), the district court applied Texas law, which enforces unambiguous choice of law provisions. *DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 678 (Tex. 1990). Paragraph 10, which states "Jurisdiction: Laws of the Republic of Ecuador," purports to apply Ecuadorian

law.[2] Based on an affidavit submitted by PetroEcuador's expert, Dr. Gustavo Romero, the court held that Ecuadorian law requires the seller to deliver conforming goods at the agreed destination, making summary judgment inappropriate for BP.

A.

Though the court correctly recognized that federal courts apply the choice of law rules of the state in which they sit, it overlooked its concurrent federal question jurisdiction that makes a conflict of laws analysis unnecessary.[3] The general federal question jurisdiction statute grants subject matter jurisdiction over every civil action that arises, *inter alia,* under a treaty of the United States. 28 U.S.C. § 1331(a). The CISG, ratified by the Senate in 1986, creates a private right of action in federal court. *Delchi Carrier v. Rotorex Corp.,* 71 F.3d 1024, 1027-28 (2d Cir. 1995). The treaty applies to "contracts of sale of goods

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[2] We assume *arguendo* that the provision stating "Jurisdiction: Laws of the Republic of Ecuador" unambiguously conveys the intent to apply Ecuadorian law.

[3] *See* 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); *Resolution Trust Corp. v. Chapman,* 29 F.3d 1120, 1124 (7th Cir. 1994) ("What Illinois courts would choose is, however, irrelevant. This is not a diversity case, where *Erie* would require the forum court to apply the whole law of the state, including its choice of law principles.").

between parties whose places of business are in different States . . . [w]hen the States are Contracting States." CISG art. 1(1)(a). BP, an American corporation, and PetroEcuador, an Ecuadorian company, contracted for the sale of gasoline; the United States and Ecuador have ratified the CISG.[4]

As incorporated federal law, the CISG governs the dispute so long as the parties have not elected to exclude its application. CISG art. 6. PetroEcuador argues that the choice of law provision demonstrates the parties' intent to apply Ecuadorian domestic law instead of the CISG. We disagree.

A signatory's assent to the CISG necessarily incorporates the treaty as part of that nation's domestic law. BP's expert witness as to Ecuadorian law, Xavier Rosales-Kuri, observed that "the following source of *Ecuadorian law* would be applicable to the present case: (i) United Nations Convention on the International Sale of Goods. . . ." PetroEcuador's expert did not disagree with this assessment.[5] Given that the

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[4] The United States Senate ratified the CISG in 1986. Ecuador ratified the CISG in 1993 without any rights or reservations. 15 U.S.C. app.

[5] Dr. Romero interprets article 4 of the Ecuador *Commercial Code* as "stat[ing] that mercantile customs (INCOTERMS) will be used to interpret commercial contract disputes when the law is 'silent' as to an issue in dispute. However, mercantile customs/INCOTERMS do not apply to the case at hand because the *Commercial Code* is not silent on the various contract issues this Agreement presents." This statement merely begs the question whether the *Commercial Code* of Ecuador applies in lieu of the

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CISG *is* Ecuadorian law, a choice of law provision designating Ecuadorian law merely confirms that the treaty governs the transaction.

Where parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG. In *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001), the court held that a choice-of-law provision selecting British Columbia law did not, without more, "evince a clear intent to opt out of the CISG. . . . Defendant's choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG *is* the law of British Columbia."[6]

Similarly, because the CISG is the law of Ecuador, it governs this dispute. "[I]f the parties decide to exclude the Convention, it should be expressly excluded by language which states that it does not apply and also states what law shall govern the

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CISG. Notably, article 4 of the *Commercial Code* was enacted in 1960, over thirty year [sic] before Ecuador ratified the CISG.

[6] *See also Ajax Tool Works, Inc. v. Can-Eng Manu. Ltd.*, 2003 U.S. Dist. LEXIS 1306, at *8 (N.D. Ill. Jan. 30, 2003) ("The parties' contract states that the 'agreement shall be governed by the laws of the Province of Ontario, Canada.' Obviously, this clause does not exclude the CISG."); *St. Paul Guardian Ins.*, 2002 U.S. Dist. LEXIS 5096, at *8 (stating that the CISG applies "[w]here parties, as here, designate a choice of law clause in their contract selecting the law of a Contracting State without expressly excluding application of the CISG. . . . To hold otherwise would undermine the objectives of the Convention which Germany has agreed to uphold.").

contract." RALPH H. FOLSOM, ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 12 (2d ed. 2001). An affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG. CISG art. 7(1).

B.

The CISG incorporates Incoterms through article 9(2), which provides:

> The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

CISG art. 9(2). Even if the usage of Incoterms is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2).[7]

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[7] *See St. Paul Guardian Ins.*, 2002 U.S. Dist. LEXIS 5096, at *9-*10 (stating that "INCOTERMS are incorporated into the CISG through Article 9(2)"); RALPH H. FOLSOM, ET AL., *supra*, at 72 ("Incoterms could be made an implicit term of the contract as part of international custom. Courts in France and Germany have done so, and both treaties and the UNCITRAL Secretariat describe Incoterms as a widely-observed usage for commercial terms.").

PetroEcuador's invitation to bid for the procurement of 140,000 barrels of gasoline proposed "CFR" delivery. The final agreement, drafted by PetroEcuador, again specified that the gasoline be sent "CFR La Libertad-Ecuador" and that the cargo's gum content be tested pre-shipment.[8] Shipments designated "CFR" require the seller to pay the costs and freight to transport the goods to the delivery port, but pass title and risk of loss to the buyer once the goods "pass the ship's rail" at the port of shipment. The goods should be tested for conformity before the risk of loss passes to the buyer. FOLSOM, *supra,* at 41. In the event of subsequent damage or loss, the buyer generally must seek a remedy against the carrier or insurer. *In re Daewoo Int'l (Am.) Corp.,* 2001 U.S. Dist. LEXIS 19796, at *8 (S.D.N.Y. Dec. 3, 2001).

In light of the parties' unambiguous use of the Incoterm "CFR," BP fulfilled its contractual obligations if the gasoline met the contract's qualitative specifications when it passed the ship's rail and risk transferred to PetroEcuador. CISG art. 36(1). Indeed, Saybolt's testing confirmed that the gasoline's gum content was adequate before departure from Texas. Nevertheless, in its opposition to BP's motion for summary judgment, PetroEcuador contends that BP

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[8] In accepting PetroEcuador's invitation, BP stated "CNF" as the condition of delivery. CNF was used in a previous version of Incoterms to specify "cost and freight" delivery. INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS 1980 (1980). In any event, the final agreement uses the term "CFR."

purchased the gasoline from Shell on an "as is" basis and thereafter failed to add sufficient gum inhibitor as a way to "cut corners."[9] In other words, the cargo contained a hidden defect.

Having appointed Saybolt to test the gasoline, PetroEcuador "ought to have discovered" the defect before the cargo left Texas. CISG art. 39(1).[10] Permitting PetroEcuador now to distance itself from Saybolt's test would negate the parties' selection of CFR delivery and would undermine the key role that reliance plays in international sales agreements. Nevertheless, BP could have breached the agreement if it provided goods that it "knew or could not have been unaware" were defective when they "passed over the ship's rail" and risk shifted to PetroEcuador. CISG art. 40.[11]

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[9] Under CISG article 36(1), "[t]he seller is liable in accordance with the contract . . . for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time."

[10] CISG article 39(1) states: "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

[11] *See also* RALPH H. FOLSOM, ET AL., *supra,* at 41 ("Thus, the buyer is still able to recover for any nonconformity which becomes apparent long after delivery, but the buyer may have to prove that the defect was present at the delivery and was not caused by buyer's use, maintenance or protection of the goods.").

Therefore, there is a fact issue as to whether BP knowingly provided gasoline with an excessive gum content. The district court should permit the parties to conduct discovery as to this issue only.

IV.

BP raises negligence and breach of contract claims against Saybolt, alleging that the company improperly tested the gasoline's gum content before shipment. These claims amount to indemnification for BP's losses suffered on account of PetroEcuador's refusal to accept delivery. Our conclusion that PetroEcuador is liable so long as BP did not knowingly provide deficient gasoline renders these claims moot. Summary judgment was therefore proper, though we need not review the district court's reasoning.

If PetroEcuador improperly refused CFR delivery, it is liable to BP for any consequential damages. In its claims against Saybolt, BP pleaded "in the alternative"; counsel also acknowledged, at oral argument, that beyond those damages stemming from PetroEcuador's refusal to accept delivery, BP has no collateral claims against Saybolt.[12] If Saybolt negligently

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[12] Theoretically, BP might still have a collateral breach of contract claim against Saybolt for $3,913.96 – the amount that it, PetroEcuador, and Shell were invoiced for Saybolt's inspection services. There is, however, no evidence in the record that BP ever paid its share of the invoice. Even so, the breach of contract claim set forth in BP's Third Amended Consolidating

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misrepresented the gasoline's gum content, PetroEcuador (not BP) becomes the party with a potential claim.

Even if PetroEcuador is not liable because BP knowingly presented gasoline with an inadequate gum content, BP's claims drop out. BP alleges that Saybolt "negligently misrepresented the quality" of the gasoline before its loading in Texas; it also claims that Saybolt's improper testing was "a proximate cause of the gasoline to be refused by PetroEcuador and/or the gum content to increase which caused BP to suffer pecuniary loss." BP's claims depend on the fact that Saybolt misrepresented the quality of the gasoline. It goes without saying, however, that if BP knew that the gasoline was deficient, it could not have relied on Saybolt's report to its detriment.

The judgment dismissing PetroEcuador is REVERSED and REMANDED for proceedings consistent with this opinion. The judgment dismissing Saybolt is AFFIRMED.

Claim alleges only that the contract requires Saybolt to "defend, indemnify and hold BP harmless from any damages." BP does not seek recovery of the inspection fee as part of its breach of contract claim.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20911

TIBER SHIPPING LLC; RIO GRANDE TRANSPORTS, in personma [sic]

Plaintiffs-Appellees

v.

EMPRESA ESTATAL PETROLEOS DEL ECUADOR (Petroecuador)

Defendant-Appellant

BP OIL INTERNATIONAL LTD; BP EXPLORATION & OIL INC

Plaintiffs-Appellees-Cross Appellants

v.

TIBER SHIPPING LLC; RIO GRANDE TRANSPORTS, in personam

Defendants-Appellants-Cross Appellees

- -

Appeal from the United States District Court for the Southern District of Texas, Houston

- -

ON PETITION FOR REHEARING EN BANC

(Filed Feb. 21, 2008)

(Opinion 1/16/08, 5 Cir., ___, ___ F.3d ___)

Before BARKSDALE, BENAVIDES, and OWEN, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is out of time. The court has allowed the late filing of the Petition for Rehearing.

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Priscilla A. Owen
United States Circuit Judge

APPENDIX E

CASE NO. 04-20911

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

BP OIL INTERNATIONAL LTD; BP EXPLORATION & OIL INC, *Plaintiffs-Appellees*

v.

EMPRESA ESTATAL PETROLEOS DEL ECUADOR (Petroecuador), ET AL., *Defendant-Appellant*

BP OIL INTERNATIONAL LTD.; BP EXPLORATION & OIL, INC., *Plaintiffs – Appellees Cross – Appellants*

v.

TIBER SHIPPING LLC; RIO GRANDE TRANSPORTS, *in personam*,

Defendants – Appellants Cross – Appellees

On Appeal from the United States District Court For the Southern District of Texas, Houston Division H-99-CV-3638 H-99-CV-1475

PETITION FOR REHEARING EN BANC OF TIBER SHIPPING, LLC AND RIO GRANDE TRANSPORT, INC.

William A. Durham
Attorney in Charge

Eastham, Watson, Dale & Forney, L.L.P. 808 Travis, 20th Floor Houston, Texas 77002-5769 (713) 225-0905 (713) 225-2907 (Fax) durham@easthamlaw.com

CERTIFICATE OF INTERESTED PERSONS AND COUNSEL

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Tiber Shipping, LLC
2. Rio Grande Transport, Inc.
3. OMI Corp.
4. BP Oil International Ltd.
5. BP Exploration & Oil Inc.
6. BP North America Petroleum, Inc.
7. BP Amoco Corporation
8. Steamship Mutual Underwriting Association Limited
9. Eastham, Watson, Dale & Forney, L.L.P.
10. William A. Durham
11. Mary C. Hubbard
12. Antonio J. Rodriguez
13. Fowler Rodriguez

/s/ William A. Durham
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STATEMENT OF COUNSEL PURSUANT TO F.R.A.P. 35(b)(1)

This matter involves issues of exceptional importance in that the proceeding involves an issue on which the panel decision conflicts with the authoritative decisions of another United States Courts of Appeals that has addressed the issue, including *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc.*, 620 F.2d 1 (1st Cir. 1980). BP Oil International Ltd. and Petroecuador were not corporately related as the parties in *Prevor-Mayersohn*. As such application of the panel's decision will have far reaching implications to parties to Bills of Lading.

STATEMENT REGARDING REFERENCES

Defendant/Claimant – Appellant – Cross Appellee Tiber Shipping, LLC is referred to hereafter as "Tiber Shipping." Defendant – Appellant – Cross

Appellee Rio Grande Transport, Inc. is referred to as "Rio Grande." Tiber Shipping and Rio Grande are collectively referred to as "the TIBER Interests." The M/T TIBER is referred to as "TIBER."

Plaintiff – Appellee – Cross Appellant BP Oil International Ltd. is referred to as "BP Oil." Plaintiff – Appellee – Cross Appellant BP Exploration and Oil, Inc. is referred to as "BP Exploration." BP Oil and BP Exploration are collectively referred to as "BP."

Defendant – Appellant Empresa Estatal Petroleos del Ecuador (Petroecuador) is referred to as "PetroEcuador."

References to the record on appeal are designated "R." and followed by the appropriate docket tab and page number. If the record reference is to a designated deposition excerpt, the appropriate deposition page and line are also given. References to the trial transcripts are designated as "T.T.," followed by the appropriate day and page number.

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STATEMENT OF ISSUES PRESENTED FOR EN BANC REVIEW

ISSUE ONE: The Trial Court erred as a matter of law by holding that both the TIBER Interests and PetroEcuador are liable to BP. As previously determined by this Court, PetroEcuador's contractual liability to BP is based on the "CFR" terms of its contract, whereby title of the cargo transferred to PetroEcuador at "the ship's rail" unless PetroEcuador could prove that BP "knew or should have known" that the cargo was defective. PetroEcuador acquired title to the cargo as it passed "the ship's rail," divesting BP of standing to sue for the cargo. The Panel Opinion to circumvent this requirement of title to be the proper party is misplaced and misapplies the cited cases.

ISSUE TWO: The Trial Court erred as a matter of law by imposing upon the TIBER Interests a misinterpreted presumption that the cargo was loaded in good order and condition. The Panel Opinion statement that the Trial Court only applied this presumption against PetroEcuador is wrong as the Trial Court says that the presumption has not been overcome by the *defendants*, which *must* be reference to PetroEcuador *and* the TIBER Interests.

ISSUE THREE: The Panel mistakenly stated that the TIBER Interests did not challenge whether bailment applied. In fact, the TIBER Interests did challenge whether bailment applied under the law of this Circuit, and went on to state that BP still has the

burden to establish delivery in good order and condition under either the Carriage of Goods by Sea Act (COGSA) or bailment.

STATEMENT OF THE CASE

This case concerns the formation of gum in a cargo of gasoline carried aboard the TIBER. This case has a long and twisted procedural history.

The case proceeded to bench trial before the Honorable Judge Kenneth M. Hoyt on August 16, 2004 and was completed on August 20, 2004. On October 12, 2004, the Trial Court entered its Memorandum and Order. (R. Tab 185, 2944 – 2925). On October 21, 2004, the Trial Court entered its Final Judgment awarding a total of $3,380,128.01 plus pre and post judgment interest against PetroEcuador and $3,179,418.01 plus pre and post judgment interest against the TIBER Interests in favor of BP, such that BP could recover the latter amount against any or all of the Defendants but could only recover the difference of $289,749.36 against PetroEcuador. (R. Tab 186, 2946 – 2945). The TIBER Interests appealed the Trial Court's determination against them and filed their Appellant's Brief on January 20, 2006.

On January 16, 2008, the Panel of the United States Court of Appeals for the Fifth Circuit issued its Opinion, affirming the judgment of the Trial Court. The TIBER Interests now file this Petition for Rehearing En Banc.

STATEMENT OF THE FACTS

This matter concerns claims for damages arising from the increased gum formation in a cargo of gasoline carried from Houston to La Libertad, Ecuador, on board the TIBER. For brevity, the TIBER Interests adopt and incorporate by reference the facts originally set forth in their Appellants' Brief and Appellee/Cross-Appellee Brief.

ARGUMENT AND AUTHORITIES

I. THE PANEL ERRED AS A MATTER OF LAW IN DETERMINING THAT BP HAD STANDING TO RECOVER CONCURRENTLY FROM BOTH PETROECUADOR AND THE TIBER INTERESTS.

BP lacks standing to assert a claim in this action. Under Federal Rule of Civil Procedure 17(a), every action brought in federal court must be prosecuted in the name of the real party in interest. FED. R. CIV. P. 17(a); *Farbwerke Hoeschst A.G. v. M/V "DON NICKY,"* 589 F.2d 795, 797 (5th Cir. 1979); *Alaska Russia Salmon Caviar Co., Inc. v. M/V "MARIT MAERSK,"* 2000 A.M.C. 2297, 2000 WL 145124, *3 (S.D.N.Y. 2000); *Marine Office of Amer. Corp. v. Lilac Marine Corp.*, 296 F.Supp.2d 91, 99 (D. Puerto Rico 2003). When shipments are made "C.I.F." or "C & F," title to the cargo passes upon delivery to the carrier, making the buyer bear the risk of loss. *DON NICKY*, 589 F.2d at 797; *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *3; *Marine Office*, 296 F.Supp.2d at 99. Thus, when cargo is allegedly damaged during

carriage, the real party in interest is the buyer, and the seller has no right to sue the carrier. *See DON NICKY*, 589 F.2d at 797; *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *3; *Marine Office*, 296 F.Supp.2d at 99. The fact that the buyer has not paid the seller or that the seller has consequentially suffered some loss in the transaction does not entitle it to sue. *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *4.

There are only three recognized exceptions to the general rule that a seller does not have standing to sue a carrier for cargo damage in a "C.I.F" transaction:

(1) when the seller acted as the buyer's representative, if said action is ratified by the latter;

(2) when the seller acted as the buyer's agent in replacing and repairing the damaged cargo; or,

(3) when the goods are rejected by the buyer and the seller accepts that rejection.

Marine Office, 296 F.Supp.2d at 100.

The first two exceptions are not implicated here: there has never been any argument or evidence that BP was acting as PetroEcuador's agent or representative in any capacity or that the cargo was replaced or repaired.

The third exception is also inapplicable. Although it is undisputed that PetroEcuador rejected the cargo,

it is also undisputed that BP did not "accept" that rejection. In this context, "acceptance" is not mere physical retention of the goods by the seller but its acceptance of the buyer's *rightful* rejection of the goods. *See Marine Office*, 296 F.Supp.2d at 100; *Transmarine Corp. v. Charles H. Levitt & Co.*, 25 F.2d 275, 277 – 78 (2nd Cir. 1928). "The cause of action against the carrier was appurtenant to the title and followed it back to the seller upon his acceptance." *Transmarine*, 25 F.2d at 278. The seller terminates the buyer's right to sue the carrier only when it again bears the loss of the rejected goods. *Id.* Thus, when a seller claims that the cargo has been wrongfully rejected, it is asserting that title, risk, and loss remained with the buyer. It is *not* "accepting" the loss. In this situation, the fact that the seller physically retains the cargo is merely collateral to the fact that the buyer, with whom title still rests, would not physically accept it. The seller's actions in disposing of that retained cargo are simply an effort to mitigate and do not reinvest the seller with standing to sue *the carrier*. When wrongful rejection is asserted, the loss allegedly experienced by the seller must be recovered against the *buyer*.

In its previous opinion, this Court held that risk and title to the gasoline cargo passed to PetroEcuador when the cargo passed "the ship's rail." *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 333, 338 (5th Cir. 2003). To determine whether PetroEcuador wrongly refused the cargo, the only question remaining was whether BP

"knew or could not have been unaware" that it was providing defective gasoline. *Id.* If so, BP was in breach of the sales contract and would retain title, and thereby retain title to sue the carrier, the TIBER Interests. *Id.* at 339.

BP has no standing to sue the TIBER Interests, as title and risk of loss transferred to PetroEcuador. *DON NICKY*, 589 F.2d at 797; *MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 at *3; *Marine Office*, 296 F.Supp.2d at 99. The Panel argues that as a consignee, BP has standing to sue and cites to *McKinlay v. Morrish*, 62 U.S. (21 How.) 343, 355 (1858), in support thereof. However, this misconstrues the legal status and standing of the consignee. A consignee is one who has the right to receive goods because of their ownership or contract rights. *See THE SALLY MAGEE*, 70 U.S. 451, 457 (1865). Here, those rights were superseded by the sales contract between BP and PetroEcuador, which transferred title and the right to receive the cargo to PetroEcuador. *BP Oil*, 332 F.3d at 338. As the title holder, PetroEcuador was entitled to receive the cargo based upon the contract with BP and BP no longer held those rights. Accordingly, those cases relying on the consignee status are inapposite as BP no longer had the consignee's rights.

Further, this Court's reliance on *Prevor-Mayorsohn Caribbean, Inc. v. P. R. Marine Mgmt., Inc.*, 620 F.2d 1 (1st Cir. 1980) in support of its opinion that "TIBER Interests were not exposed to double recovery" is misplaced. In *Prevor-Mayorsohn*, the

appellant corporation was a wholly owned subsidiary of its parent corporation and was the bailee for a spoiled shipment of fruit. *Id.* at 1. The trial court dismissed the corporation's action after it determined that it was only the bailee of the fruit and did not actually hold title to the fruit. *Id.* The First Circuit, however, vacated the judgment of the district court, thereby allowing the wholly owned subsidiary corporation to maintain its action despite the fact that the parent company actually held title to the fruit. *Id.* at 4.

The First Circuit reasoned that because "Prevor and its parent company are clearly all part of a single operation," the defendant therein was "amply protected against the possibility of exposure to subsequent suit." *Id.* at 5. *Prevor-Mayorsohn* is therefore clearly distinguishable from the facts herein because BP and PetroEcuador are not corporately related.

Moreover, simply because PetroEcuador did not pursue a cause of action against the TIBER Interests does not negate the fact that the possibility of double exposure exists. In fact, the TIBER Interests could be subject to a lawsuit brought by PetroEcuador in either a U.S. or an Ecuadorian Court. Thus, the TIBER Interests are clearly not adequately protected from a double recovery.

II. THE PANEL ERRED AS A MATTER OF LAW BY MISINTERPRETING AND MISAPPLYING A PREVIOUS DETERMINATION OF THIS COURT THEREBY IMPOSING AN IMPROPER PRESUMPTION AGAINST THE TIBER INTERESTS.

The Trial Court's Opinion begins the analysis by stating:

> The Fifth Circuit held that while gasoline samples taken by Shell and Saybolt established that the gasoline cargo was within contract specifications at the load point, they did not resolve the issue of whether there was a known or hidden defect in the gasoline. It is the Court's view that this fact and holding establish a presumption that the cargo had no hidden defect.

(R. Tab 185, 2939). To the extent that this statement correctly interprets this Court's prior holding, *it cannot be applied as to the TIBER Interests.* The Panel does not dispute this, but makes the incorrect statement that the Trial Court only applied the presumption to PetroEcuador. This is incorrect. The Trial Court specifically held "[t]he presumption that the cargo had no hidden defects has not been overcome by the defendants." (R. Tab 185, 2929). This must include *both* PetroEcuador and the TIBER Interests in order to be "defendants."

The only sentence of this Court's prior opinion that could be construed as a "finding of fact" regarding the condition of the cargo is "[i]ndeed, Saybolt's testing confirmed that the gasoline's gum content was

adequate before departure from Texas." *BP Oil*, 332 F.3d at 338. A logical reading of this sentence does not impute a finding of good order and condition. To the extent that it does, and in light of the undisputed evidence that (1) no representative pre-loading samples of the cargo were taken; and (2) the alleged "composite" samples taken from the TIBER's tanks were not representative of a homogenous cargo, it was clearly erroneous.

Even if the previous holding of this Court could be held against the TIBER Interests, the Trial Court's interpretation of the holding misconstrues its scope and the context in which it was written. The previous opinion only discusses the contractual obligations between PetroEcuador and BP. *BP Oil*, 332 F.3d at 338. The discussion is not in the context of a bailment claim, a COGSA claim, or even a negligence claim. The presented issue was simply whether PetroEcuador properly refused the cargo under the terms and conditions of their contract. *Id.* at 335. To the extent that there exists a factual finding that the cargo complied with the contractual specifications at loading, it was only necessary in the context of determining whether PetroEcuador breached its contract with BP. It was absolutely irrelevant in determining the rights and liabilities as between BP and the TIBER Interests.

Thus, the Trial Court's improper imposition of any presumption regarding the condition of the cargo against the TIBER Interests was manifest error, not supported by the record, not supported by any legal

authority, and the Panel's endorsement by arguing the clear burden placed on the Plaintiff is error.

III. The Panel erred by stating that the TIBER Interests did not challenge the bailment application.

The Panel mistakenly stated that the TIBER Interests did not challenge the conclusion that bailment applies. In fact, the TIBER Interests did challenge that conclusion and assert that COGSA applies. In their Appellant Brief, the TIBER Interests argued that "[t]he Fifth Circuit has thus far reserved its determination regarding whether COGSA, when it applies, provides the charterer's exclusive remedy against the vessel owner for cargo damage. *See Thyssen Steel Co. v. KAVO YERAKAS*, 50 F.3d 1349, 1354 (5th Cir. 1995); *Associated Metals & Minerals Corp. v. ALEXANDER'S UNITY MV*, 41 F.3d 1007, 1017 (5th Cir. 1995). It appears that even if a tort claim can be brought, recovery pursuant to the tort claim is still controlled by COGSA. *See Steel Coils, Inc. v. M/V LAKE MARION*, 331 F.3d 422, 438 n.73 (5th Cir. 2003). Under COGSA's "ping pong" scheme of burden shifting, the initial burden is on the cargo interest to prove that the cargo was loaded in an undamaged condition and discharged in a damaged condition. *Tubacex, Inc. v. M/V RISAN*, 45 F.3d 951, 954 (5th Cir. 1995). However, this Court need not reach whether COGSA provides the exclusive remedy against the TIBER Interests as the initial burden of proof of good order and condition remains BP's

burden under either COGSA or a bailment theory." Brief for Appellant at 19 n.5, *BP Oil v. PetroEcuador*, (No. 04-20911).

CONCLUSION

The judgment against the TIBER Interests must be reversed. The Trial Court erred in simultaneously holding PetroEcuador and the TIBER Interests liable to BP, in contravention of the general rule of admiralty law that standing to sue "follows" the title to the cargo.

The Trial Court based its analysis and conclusion on a presumption that was misconstrued from this Court's previous opinion and improperly imposed against the TIBER Interests. Additionally, under either a COGSA or bailment analysis, BP as shipper carries the initial burden of proof against the carrier. Until BP meets this burden by a preponderance of the evidence, no presumption can be enforced against the TIBER Interests.

The Trial Court also erred in determining that the condition of the cargo was "undisputed" to be in good order and condition at the time it was delivered to the TIBER. As the record clearly reflects, the condition of the cargo as delivered to the TIBER was contested throughout the five day trial. The evidence remains undisputed, however, that no samples were ever taken of the cargo's static and complete condition on shore, prior to loading. Even if post-loading ship samples could be imputed as representative of pre-loading conditions, the evidence is further undisputed

that no static and complete samples were taken on the TIBER prior to its sailing for Ecuador. As there is no evidence of the cargo's pre-loading condition, BP failed in carrying its burden of proof.

It is requested that after consideration of the foregoing, Appellant's brief, Appellee's brief, and reply briefs, that this Court apply the correct legal standard, reverse and render the Trial Court, and vacate the Judgment against the TIBER Interests, such that BP take nothing by way of its claims against them. It is requested that the Court grant the TIBER Interests' Petition for Rehearing En Banc, withdraw the Panel's Opinion and issue an Opinion in conformity with this Court's prior precedent, thereby reversing the Trial Court's determination against the TIBER Interests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I forwarded a true and correct copy of the foregoing in both paper and electronic form to the following counsel of record *via Federal Express* on this the **6th** day of **February 2008**.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because:

   this brief does not exceed 15 pages, excluding the parts of the Petition exempted by Fed. R. App. P. 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman font.

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Attorney for Defendants – Appellants – Cross Appellees, Tiber Shipping, LLC and Rio Grande Transport, Inc.

Dated: February 5, 2008

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Supreme Court, U.S.
FILED

No. (2)

071490 MAY 20 2008

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In The

Supreme Court of the United States

TIBER SHIPPING LLC;
RIO GRANDE TRANSPORTS, *in personam*,

Petitioners,

v.

BP OIL INTERNATIONAL LTD; BP EXPLORATION & OIL INC; EMPRESA ESTATAL PETROLEOS DEL ECUADOR (Petroecuador),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BP OIL INTERNATIONAL LTD., and BP EXPLORATION AND OIL, INC.,	§	
Plaintiffs	§	
vs.	§	CIVIL ACTION
EMPRESA ESTATAL PETROLEOS DEL ECUADOR (PETROECUADOR), M/T TIBER, her engines, tackle and gear, TIBER SHIPPING, LLC and RIO GRANDE TRANSPORT, and SAYBOLT, INC.	§	NO. H-99-1475
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 13, 2001)

I. INTRODUCTION

Before the Court are the defendant, Saybolt, Inc.'s ("Saybolt") motion for summary judgment (#38), the defendant, Empress Estatal Petroleos del Ecuador's motions to amend its responses to admissions (#69); and to apply the law of Ecuador ("PetroEcuador") (#68); and the plaintiffs, BP Oil International LTD's

and BP Exploration and Oil, Inc.'s ("BP Oil") motion for summary judgment (#74) against PetroEcuador.

After considering the motions, the responses, the replies, the record and the applicable law, the Court is of the opinion that the law of Ecuador applies, that BP Oil's Motion For Summary Judgment should be denied, that PetroEcuador's Motion to Amend its answer to BP Oil's Request For Admissions should be Granted[1] and that Saybolt's motion for summary judgment should be granted.

II. FACTS

BP Oil contracted to sell approximately six million gallons of high octane naphtha[2] to PetroEcuador to be shipped by tanker from Houston to Ecuador. The agreement further required that the product meet set specifications or standards determined by the terms of the Contract and that the product be tested for conformity with those standards upon arrival in Ecuador.

Saybolt tested the product before it left Houston and reported that the product was within contract

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[1] Based upon new evidence discovered by PetroEcuador, that being the interpretation of Ecuadorian law as applied to the CFR terms of the Contract, the Court allows PetroEcuador to amend its answers to BP Oil's Request For Admissions.

[2] Naphtha is any of various volatile, highly flammable, liquid hydrocarbon mixtures used chiefly as solvents and diluents and as raw materials for conversion to gasoline.

standards. However, PetroEcuador disputes the fact of conformity of the product upon arrival in Ecuador. According to PetroEcuador, the "gum" content of the product was substantially higher upon arrival than reported in Houston.[3] When it ascertained that the product was not within the specifications of the contract, PetroEcuador refused to allow the product to be discharged from the ship, rejecting the delivery. As a result, BP Oil shipped the naphtha back to Houston and sold it at a loss to Shell Oil.

On May 14, 1999, BP Oil filed this lawsuit against PetroEcuador for breach of contract and wrongful draw on a letter of guaranty. Additionally, on October 19, 1999, BP Oil filed an admiralty claim against M/T TIBER, her engines, tackle and gear, and TS & RGT. By Order of this Court, dated February 4, 2000, these cases were consolidated. Later, on April 20, 2000, BP Oil added Saybolt as a defendant.

III. CONTENTIONS OF THE PARTIES

BP Oil, in seeking summary judgment on the issue of liability against PetroEcuador, contends that irrespective of whether international contract law is applied, specifically the United Nations Convention on the Contracts for the International Sale of Goods

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[3] The Contract required that the gum content of the naphtha not exceed 3mg/100ml. When tested in Ecuador the gum content was 11.6mg/100ml.

("CISG")[4], or the law of Ecuador, PetroEcuador is liable to it for all damages arising from PetroEcuador's breach of contract. BP Oil contends that this is so because as seller, it performed all of its obligations under the terms of the Contract. PetroEcuador asserts, pursuant to agreement, that the law of Ecuador applies and, as a matter of Ecuadorian law, that it was within its rights to refuse a non-conforming product without recourse.

IV. STANDARD OF REVIEW

A. Rule 56(c) Motions

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to . . . judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts" in the record "showing that

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[4] *See* 15 U.S.C.A. App., United Nations Convention on International Sales (1983).

there is a genuine issue for trial." *Id.* at 324. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). A failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *See Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

The primary inquiry here is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *See Anderson*, 477 U.S. at 251-52. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of a summary judgment. *Id.*

V. DISCUSSION CHOICE OF LAW

A. BP Oil's Motion For Summary Judgment

1. Choice of law

BP Oil contends, notwithstanding the choice-of-law clause set forth within the contract, that the law of Ecuador does not apply to this case. Rather, BP Oil contends, the CISG applies because the United States and Ecuador are signatories to the CISG. PetroEcuador asserts, on the contrary, that the choice of law

clause within the contract controls what law is applicable to this dispute. Thus, PetroEcuador asserts that the law of Ecuador applies. The Court will examine this dispute within the parameter of Texas conflict of laws provisions.

Federal district courts apply the choice of law rules of the state in which they sit. *See Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 452 n.2 (5th Cir. 2001) (citation omitted); *Resolution Trust Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1318 (5th Cir 1992); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir. 1988). Texas choice of law rules recognize valid choice of law clauses. *Interfirst Bank Clifton*, 958 F.2d at 285 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984)). Thus, parties may agree to a choice of law or choice of forum clause by contract. *See, e.g., Haynsworth v. The Corp.*, 121 F.3d 956, 961-69 (5th Cir. 1997); *Gulf Ins. Co. v. M/V Rei Feng*, ___ F. Supp.3d ___ (S.D. Tex. 2001). Such agreements, absent a violation of federal or state law, and public policy, are valid and enforceable. *Haynsworth*, 121 F.3d at 961-69; *Gulf Ins. Co.*, ___ F. Supp.3d at ___; *see also Cherokee Pump & Equip. Inc., v. Aurora Pump*, 38 F.3d 246 (5th Cir. 1994).

"Under the Texas rules, in those contract cases in which the parties have agreed to an enforceable choice of law clause, the law of the chosen [nation] must be applied." *Resolution Trust Corp.*, 958 F.2d at 1318 (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990)). Absent ambiguity, a court should enforce the parties' agreement. Concerning

contract interpretation, it is basic that absent ambiguity in a contract the four corners of the agreement best represent the intentions of the parties. *See, e.g., Palma v. Verex Assurance, Inc.*, 79 F.3d 1453, 1458 (5th Cir. 1996); *Chapman v. Hootman*, 999 S.W.2d 118, 122-23 (Tex. App.-Houston [14th Dist.] 1999, no writ) (citing *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)).

BP Oil proffers case law for the propositions that Texas applies a more significant relationship test to the disputed transaction. Therefore, Texas laws should apply to the present dispute. Following this line of thinking, BP Oil argues that the CISG is applicable because the choice of law clause at issue is permissive and not binding and because the law of Ecuador and Texas (controlled by the CISG), or Connecticut (controlled by the CISG) are the same concerning a shipment of conforming or non-conforming goods.

The Court rejects BP Oil's assertions and arguments. The choice of law clause within the contract is clear and unambiguous. The law of the Republic of Ecuador applies. It is clear that the parties intended that their transaction to be guided by the law of Ecuador by the four corners of the contract. The fact that the clause, setting forth the choice of law provision, is titled "Jurisdiction" does not make the choice of law provision ambiguous. Moreover, there is nothing in the record that otherwise suggests that BP Oil was misled by any term of the contract. And, BP Oil does not claim that PetroEcuador misrepresented any

fact. Thus, the Court concludes that the law of Ecuador govern the parties' transaction.[5]

2. Cost of Freight-Term Inapplicable

Next, BP Oil points out that the contract also contains a Cost and Freight ("CFR") term. Relying on the International Chamber of Commerce definition, which the CISG incorporates, BP Oil interprets the CFR term to call for the risk of loss to pass to PetroEcuador at the time that the product is delivered to the common carrier. This interpretation is flawed. Under the law of Ecuador, the seller must

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[5] BP Oil's contention that the CISG prevents the laws of Ecuador from applying is similarly unpersuasive. Article Six of the CISG provides " . . . parties may exclude the application of [the CISG] or, subject to article 12, derogate from or vary the effect of any of [the CISG's] provisions." 15 U.S.C.A. App., UN Conv. Int. Sale. Courts have interpreted Article Six to stand for the proposition that parties may contract out of CISG provisions that apply to an international sales contract. *See, e.g., Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 n.1 (2d Cir. 1995) (holding that the CISG allows "parties [to] contract . . . to be bound by a source other than the CISG . . . "); *Supermicro Computer Inc., v. Digitechnic, S.A.*, 145 F. Supp.2d 1147, 1151 (N.D. Cal. 2001) (holding that where a choice of law provision appears in a contract between parties to a contract where the parties' nations are signatories to the CISG, if a choice-of-law provision is silent as to what law controls the parties' transaction, then the CISG controls); *see also, e.g., Fercus, S.R.L., v. Palazzo*, No. CIV.7728 (NRB), 2000 WL 1118925, at *2 (S.D.N.Y. Aug 8, 2000) (holding that one factor to determine if the CISG applies to an international sale of goods is when " . . . the contract between the parties *does not* have a choice of law provision.").

deliver conforming goods at the agreed destination. Here, that destination, was PetroEcuador's facility in Ecuador.[6] There is no genuine dispute that BP Oil failed to deliver conforming goods according to the contract. Therefore, PetroEcuador is not obligated under the CFR term, and BP Oil's motion for summary judgment, on the issues of breach of contract and cost of freight charges, is denied.

VI. Saybolt's Motion For Summary Judgment

In its Second Amended Complaint (#29), BP Oil asserted, for the first time, a cause of action against Saybolt. Saybolt's duty was to ensure that the product in question met the specifications of the PetroEcuador/BP Oil contract prior to loading. BP Oil claims that Saybolt was negligent in its testing and thereby became vicariously liable for BP Oil's damages proximately caused by Saybolt's negligence. Since, BP Oil amended its pleading by a Third

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[6] The Court, in accords with Federal Rules of Civil Procedure 44.1, *see* FED. R. CIV. P. 44.1; *Randall v. Arabian Am. Oil Co.*, 778 F.2d 1146, 1151 n.4 (5th Cir. 1985); *Access Telecom, Inc., v. MCI Telecommunications Corp.*, 197 F.3d 694, 713 (5th Cir. 1999), takes judicial notice of an affidavit submitted by PetroEcuador's expert witness, Dr. Gustavo Romero, who is admitted to practice law before the Supreme Court of Ecuador and all jurisdictions within that country, that Ecuadorian law, Articles 705-06 and 719, published in the Supplement to the Official Register (of Ecuador) No. 104 on November 20, 1970, provides that a seller has a duty to deliver conforming goods to the agreed place of delivery.

Amended Complaint (#47). There, BP Oil asserts a contract claim against Saybolt for indemnify [sic] and to be held harmless from any damages that may have resulted from the non-conforming product.

A. Saybolt's Contentions

Saybolt has filed a motion for summary judgment asserting a limitation of liability defense and a waiver of claims based on the terms of the contract for the testing services between Saybolt and BP Oil. Thus, Saybolt contends that the total liability for-which it may have exposure does not exceed the amount paid by BP Oil for the testing performed by Saybolt.

Saybolt contends that the contract between BP Oil and PetroEcuador permitted PetroEcuador to select an independent lab to test the product. Pursuant to that contract, PetroEcuador selected Saybolt. Saybolt asserts that it performed the test in accordance with a longstanding Inspection Service Agreement ("ISA") that it has with BP Oil that dates back to 1992. Saybolt also contends that the billing and payment instructions contain a provision that limits Saybolt's liability to the amount of the testing charges. Saybolt argues that this limitation of liability provision is also part of BP Oil's standard terms and conditions that is customarily imposed upon inspection companies like Saybolt. The relevant provisions of the BP Oil/Saybolt contract provide:

> All services performed by Petroleum Inspection Company (hereinafter referred to as "Inspection Company") for BP Oil Company (hereinafter called "BP Oil") are undertaken and the rates and charges of Inspection Company are based upon the following terms and conditions:
>
> 1. The total liability of Inspection Company, its officers, employees, agents, or subcontractors for any loss or damage claimed, either directly or indirectly, in contract, tort or otherwise in connection with the performance or nonperformance of the work involved shall not exceed the amount paid or payable by BP Oil for such work.

Saybolt contends that other contract provisions also support its claim that Saybolt is not liable, as a matter of law, on BP Oil's claims. The contract provides:

> All claims made against Inspection Company must be in writing within forty-five (45) days after delivery of Inspection Company's report regarding said services or such claim shall be deemed irrevocably waived.

Therefore, Saybolt asserts that the further defense of waiver or laches applies because BP Oil failed to make a timely claim.

B. BP Oil's Contentions

BP Oil contends that the ISA is the entire agreement between the parties, thereby, negating Saybolt's argument that the billing and payment instruction's invoice should be given effect. BP Oil also contends that the Standard Inspection Rates Agreement ("SIRA") can be, and is, overridden by specific contract provisions such as those in the ISA between BP Oil and Saybolt. Thus, BP Oil contends that Saybolt is liable for all damages, cost and expenses incurred by BP Oil in defending itself against PetroEcuador's suit. The provision relied upon by BP Oil states:

> INSPECTOR hereby indemnifies and agrees to defend and save OWNER and its affiliated corporations, their agents, servants and employees, harmless from all liabilities and claims for loss, damage or injury to or death of persons or property, including property of OWNER, in any manner arising out of or in connection with the INSPECTION, except for such injuries or damage to property as may result from the sole fault or negligence of OWNER or of those parties that OWNER may be responsible for, and INSPECTOR agrees to pay all damages, costs and expenses, including attorneys' fees, arising in connection with this indemnity.

VII. DISCUSSION SAYBOLT CONTRACT CLAIM

This Court is of the opinion and holds that BP Oil's interpretation of the "inspector" provision is

flawed. Moreover, even if BP Oil's interpretation is correct BP Oil is not obliged to litigate its indemnity claim in this suit. This is so because no liability has been established upon which an indemnity suit may rest. The Court interprets the "Inspector" provision as requiring indemnity where Saybolt's actions or conduct result in injury or death to persons or property, or where Saybolt's conduct places the owner in a position that injury or death to a person or property results. Clearly, the provision is designed to place responsibility for harm to persons or property on those who cause it. The easy examples are inquiries to employers or contamination of the owner's product during the inspection process.

In the case at bar, no act is attributed to Saybolt that caused damage or harm to BP Oil's employees or product. The product either met specifications when it left Houston, or it did not. The product either met specifications when it reached Ecuador, or it did not. No act done by Saybolt in Houston, Ecuador, or between the points damaged the product. Thus, the Court concludes that the "Inspector" provision is inapplicable to this case.

The Court is also of the opinion and hold [sic] that BP Oil is bound by the waiver provision in the contract. [*See* PetroEcuador Ex. 4, p. 17]. On or before May 28, 1998, BP Oil became aware that its product would not be discharged by PetroEcuador because the product did not meet contract specifications. Yet, BP Oil did not file a claim against PetroEcuador until

April 20, 2000, well past the 45 days after PetroEcuador refused delivery.

Finally, the Court holds that BP Oil's claim sounds only in contract and seeks indemnity for economic losses resulting from a service provided as opposed to the damages to its product. Therefore, BP Oil has only a suit in contract against Saybolt. *See Arkwright-Boston Mfrs. Mutual Ins. Co. v. Westinghouse Electric Corp.* 844 F.2d 1174 (5th Cir. 1988); *see also Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493 (Tex. 1991). In this regard, BP Oil irrevocably waived any contractual claim that it may have had against Saybolt when it failed to timely notify Saybolt of its claim. Even if the Court is in error on that point, Saybolt's liability, as an Inspector, is limited to the amount paid by BP Oil for the inspection.

VI [sic]. CONCLUSION

Summary judgment is appropriate where the file establishes that there is no genuine issue as to any material fact. Such is the case here. In light of the foregoing analysis, the Court concludes that BP Oil's Motion For Summary Judgment is DENIED. In so doing, the Court Declares that PetroEcuador is entitled to judgment as a matter of law. PetroEcuador's Motion to Amend its admissions to BP Oil's Request For Admissions is GRANTED. Finally, Saybolt's Motion For Summary Judgment is GRANTED.

It is so ORDERED.

Signed this 9th day of November, 2001.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge